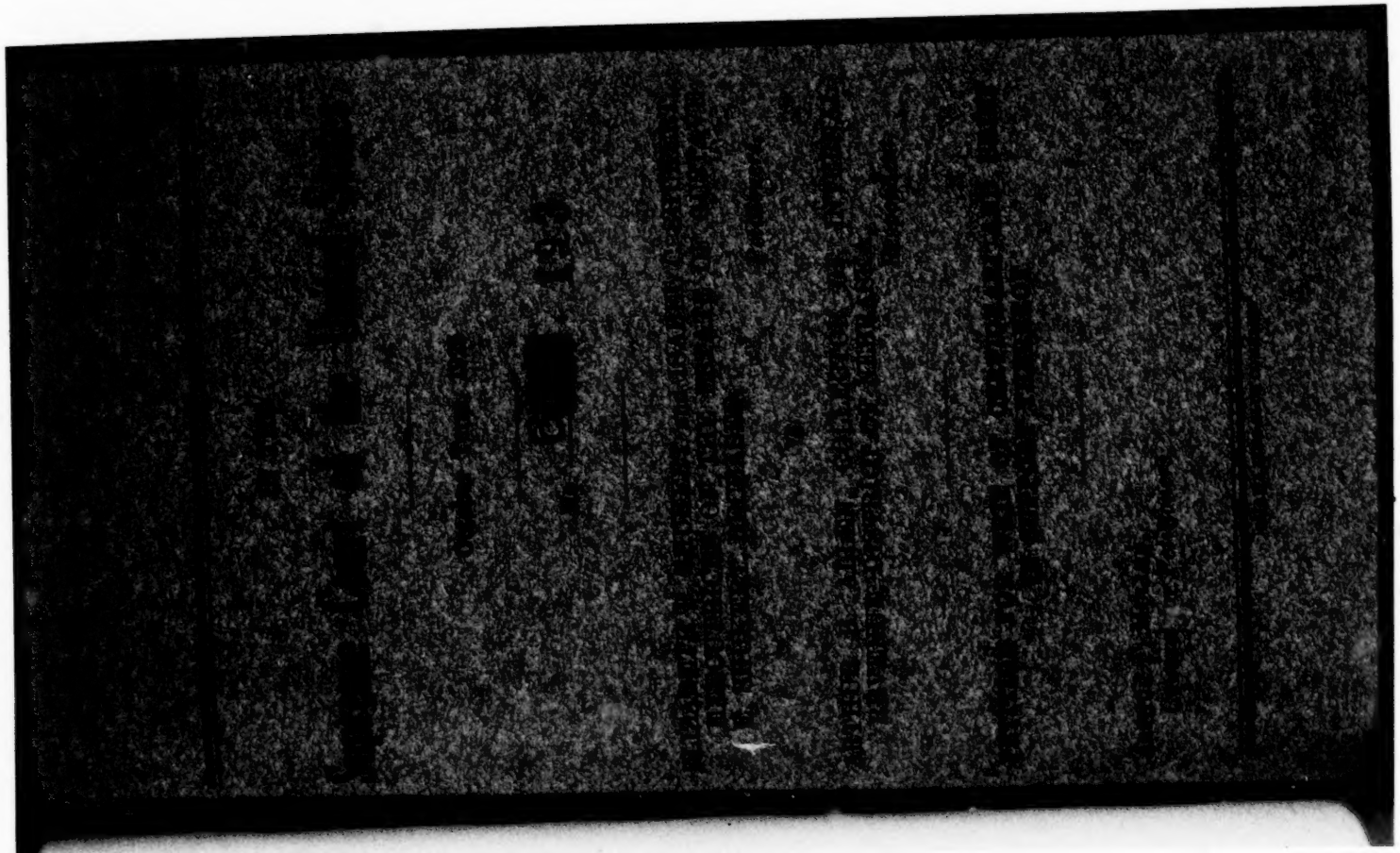

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IN THE

Supreme Court of the United States

October Term, 1925

No. ———

ELIZABETH F. SHUKERT and ISABEL C. SHUKERT, EXECUTRICES OF THE ESTATE OF GUSTAVE E. SHUKERT, DECEASED,

Petitioners,

vs.

ARTHUR B. ALLEN, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The above named petitioners, Elizabeth F. Shukert and Isabel C. Shukert, Executrices of the estate of Gustave E. Shukert, deceased, pray for a writ of certiorari to review the order and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, filed May 16, 1925, in a cause heard and determined in said court on a writ of error from the judgment of the District Court of the United States for the District of Nebraska and entitled Elizabeth F. Shukert and Isabel C. Shukert, Executrices of the Estate of Gustave E. Shukert, Deceased, plaintiffs in error, and Arthur B. Allen, Collector of Internal Revenue, District of Nebraska, defend-

ant in error. (See *Shukert vs. Allen,* 300 Fed. 754.) A certified copy of the record and proceedings thereof are filed and presented herewith.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

In this action petitioners sued respondent to recover the sum of $13,685.47, alleging the same to have been erroneously and wrongfully assessed against and collected from the estate of petitioners' decedent as an estate tax under the provisions of the Revenue Act of 1918.

The case involves the construction, and application to the facts disclosed by the record, of so much of the following provisions of the Act of Congress known as "Revenue Act of 1918," whereby a tax is imposed upon the net estate of every decedent dying after the passage of said Act, as requires to be included in the "value of the gross estate," the "value" of property "with respect to which" the decedent "has at any time created a trust * * * intended to take effect in possession or enjoyment at or after his death":

> Section 401. "* * * a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Sec. 403), is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States: (Here follows a schedule of the percentages to be applied."
>
> Section 402. "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real and personal, tangible or intangible, wherever situated—
>
> (a) to the extent of the interest therein of the decedent at the time of his death, which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and is subject to distribution as part of his estate * * *
>
> (c) to the extent of any interest therein of which the decedent at any time made a transfer, or with respect

to which he has at any time created a trust in contemplation of, *or intended to take effect in possession or enjoyment at or after his death.* * * *"

The facts are undisputed, and, briefly, may be stated as follows:

On May 5th, 1921, Gustave E. Shukert transferred to the United States Trust Company by trust deed, absolute in form, certain securities—consisting of liberty bonds and notes secured by real estate mortgages—of the par value of $225,000.00, but, as found by the Revenue Department, for "federal estate tax" purposes, to be of the actual value of $190,157.55. The conveyance was in trust for the use and benefit of the grantor's three children, with no reservations of any nature in favor of the grantor. The conveyance took immediate effect, was accompanied by delivery of the property conveyed, was purely voluntary and without monetary consideration.

Reference to said trust deed (R. 28-31) shows:

(a) there was a transfer of property, that is to say, Shukert thereby transferred to the trustee, for the use and benefit of the beneficiaries named, certain property;

(b) the income of the trust fund so created is to accumulate in the hands of the trustee until the termination of the trust, that is to say, apart from certain minor payments authorized to be made to Shukert's wife and children sufficient to pay "for the bare necessities of life" in case of their "extreme destitution," the income of the trust fund is to accumulate until the termination of the trust;

(c) the trust is to continue for a period of approximately thirty years, that is to say, the trust is to terminate on February 1st, 1951, unless the death of the last survivor of the beneficiaries named shall have occurred more than twenty-one years prior to February 1st, 1951, in which case

the trust is to terminate twenty-one years after the death of such last survivor;

(d) the sole beneficiaries of the trust are Shukert's three children, that is to say: at the termination of the trust, all the principal and accumulated income therefrom is to be paid, share and share alike, to said three children and to the survivor or survivors of them, provided the issue of any deceased child shall take the share such deceased child would have taken had he or she survived;

(e) the trust is fixed and unalterable, that is to say, there is no power reserved to Shukert or any other person to change, modify or alter any of the terms or conditions of the trust;; likewise, there is no reservation of power or control, either absolute or advisory, on the part of Shukert; likewise, there is no reservation, on the part of Shukert or any other person to revoke or annul said trust in whole or in part;

(f) the trust took effect, as to the decedent Shukert, in title, possession and enjoyment at the time of its creation, that is to say, the title, possession and enjoyment of the trust estate passed, and was intended to pass, irrevocably, from Shukert on May 5th, 1921.

At the time of the creation of said trust Shukert was fifty-six years of age, and had a life expectancy of about sixteen years. His family consisted of himself, his wife, age 52, two daughters, age 27 and 21, respectively, and a son, age 15. Shukert was then, and for many years past had been, engaged in the wholesale and retail fur business and had amassed a considerable fortune. At the time of his death, which occurred a few months afterward, he was possessed of a gross estate, exclusive of the property conveyed in trust as aforesaid, of a little more than $800,000.00, of which more than $500,000.00 was liquid assets consisting of stocks, bonds and mortgage notes.

On September 29th, 1921—four months and twenty-four days after creating said trust—Shukert died, testate. By his will, made two days before his death, he disposed of all the estate of which he died seized and appointed petitioners as executrices of his estate. The petitioners, as such executrices, duly filed with the respondent, as Collector of Internal Revenue, in the manner and form required by the Revenu Act of 1918, the return of said estate for federal estate taxes and paid the estate taxes due on the return so made. In said return the petitioners did not include in the "gross value of the estate of decedent" the property transferred by the trust deed aforesaid.

Afterward, on the final audit and review of the return so filed by the petitioners, the Commissioner of Internal Revenue included in "the gross value of the estate of decedent" the property transferred by the trust deed aforesaid, and found the value of said property to be $190,157.55 and assessed an additional estate tax against said estate on account thereof in the sum of $13,685.47. The petitioners paid said additional tax, under protest, made claim for refund, and said claim being rejected by the Revenue Department brought this action against the respondent to recover the additional estate tax so paid. The ground of petitioners' action being that the transfer of property and trust made and created by the trust deed of May 5th, 1921, was not "in contemplation of or to take effect in possession or enjoyment at or after his death" and, therefore, the inclusion of the value of the property so transferred in the gross estate of the decedent was wrongful illegal and without authority of law.

The trial court, on motion of respondent, instructed the jury to return a verdict in his favor, for that: the trust created by Shukert in his lifetime was intended to take effect in possession or enjoyment at or after his death. Reference to the trial court's opinion in ruling on the motion for a directed verdict (R. 180-183) shows that said court held:

the terms and nature of the trust were such that it operated to vest both the legal and equitable estate upon the parties *in praesenti;* the words "intended to take possession or enjoyment at or after his death," as found in sub-par. (c), Sec. 402, as applied to trusts, has reference to possession or enjoyment by the beneficiaries and not the grantor; and inasmuch as the trust was to continue and the income thereof to accumulate, and neither possession nor enjoyment thereof to come to the beneficiaries until the expiration of a period "beyond any time that he (Shukert) expected to live himself," therefore, the trust was intended by Shukert to take effect in possession and enjoyment after his death, within the meaning of the provisions of Sub-par. (c), Sec. 402 and, hence, the value of the property so transferred was to be included in the value of decedent's gross estate and taxed accordingly.

THE DECISION OF THE CIRCUIT COURT OF APPEALS

In its opinion (R. 189-193), the Circuit Court of Appeals, in affirming the judgment below, without comment or further exposition of the law, adopted the opinion of the trial court; that is to say: the Circuit Court of Appeals said:

> "We think the trial court was correct in his holding and judgment and that his opinion sets forth the proper theory with exception of one statement."

The exception was as to that part of the trial court's opinion which stated that the nature of the trust was such that it operated *in presenti* to confer both the legal and equitable title upon the parties designated. As to that the Circuit Court of Appeals said:

> "We think the court was wrong here. We think while the legal title vested *in presenti* under the trust deed, the equitable title was held in suspension. There was no assurance that any one of the children would ever take the legal title to any part of the fund."

It thus appears from the opinion of the Circuit Court of Appeals that said court likewise held that the words "intended to take effect in possession or enjoyment at or after his death" as used in Sub-par. (c), Sec. 402, as applied to trusts, has reference to possession or enjoyment by the beneficiaries and not by the grantor; and that inasmuch as the trust was to continue and accumulate and neither possession nor enjoyment thereof to come to the beneficiaries, until the expiration of a period beyond any time Shukert himself expected to live, the trust was one intended to take effect in possession and enjoyment after Shukert's death within the meaning of the provisions of Sub-par. (c), Sec. 402, and, therefore, the value of the property so transferred was to be included in the gross value of the decedent's estate and taxed as such.

On the record this question is presented: Is a trust created by a decedent with respect to certain property—a trust "intended to take effect in possession or enjoyment at or after his death" within the meaning of Sub-par. (c), Sec. 402, Revenue Act of 1918, and, hence, the value of the property "with respect to which" the trust was created is to be included in the "gross estate" of decedent and the estate taxed accordingly, it appearing that:

(a) The trust was created by trust deed whereby decedent transferred certain property to the trustee without reservation of right, title or interest therein or to the income therefrom;

(b) The fund was to accumulate in the hands of the trustee for a fixed term of years (about thirty years) and at the expiration thereof the fund and all accumulations thereof to be paid by the trustee to the beneficiaries named in the trust deed;

(c) The decedent at the time of the creation of the trust having a life expectancy of several years (about sixteen years) and he himself expecting to live that long or longer;

(d) The term of the trust, however extending beyond his life expectancy, beyond the time he himself expected, or could reasonably expect to live, and he, in fact, dying a few months after creating the trust?

The Circuit Court of Appeals answered the question in the affirmative to the prejudice of the petitioners and, as petitioners believe, in so doing, misconceived and misapplied the law.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. Because the case involves an important question of federal law which has not been, but should be, settled by this court.

2. Because, in view of the large number of trusts created by various persons in all parts of this country, the question involved herein is of such general and material importance and interest that it should be settled by this court.

3. Because the question involved in and presented by this case is the legal and just construction and effect of the provisions of the Revenue Laws of 1918 and 1924 pertaining to "estate taxes," and should be authoritatively and finally adjudged and settled by this court upon and after a full presentation to it of the merits of the question.

The question is one of taxation. This is ever a matter of concern and importance to both government and citizen.

The question arises under the Act of Congress known as the "Revenue Act of 1918," and involves the construction and application, particularly of Sub-par. (c) of Sec. 402, of said Act; hence, is a question of federal law. Sub-par. (c), Sec. 402, Revenue Act of 1918, and Sub-par. (c), Sec. 302, Revenue Act of 1924, are identical in terms; hence the question is equally important and federal under the latter Act.

This court has not decided this question. It should do so. No other tribunal can give a final and authoritative decision, binding alike on government and citizen, and thereby establish a correct construction and a uniform operation of the Act throughout the United States.

The application and allowance of the writ is sanctioned by the precedents of this court.

Edwards vs. Slocum, 204 U. S. 61, was heard on Certiorari to the Circuit Court of Appeals for the Second Circuit. The case was under the Revenue Act of 1918. The only question involved was, whether in computing the amount of "estate tax" to be paid the amount of the tax was to be deducted from the exemptions, thereby adding the amount of the tax to the taxable estate. This, of course, was but a question of the construction of the Revenue Law of 1918.

United States vs. Merriam, 263 U. S. 179 was heard on Certiorari to the Circuit Court of Appeals for the Second Circuit. The case was under the Revenue Act of 1913, and the only question involved was, whether bequests in decedent's will to his executors, in lieu of their services as such, was compensation for services and, therefore, taxable as income. This likewise was a construction and application of the revenue laws.

Weis vs. Stern, 265 U. S. 242, was heard on Certiorari to the Circuit Court of Appeals for the Sixth Circuit. The case was under the Revenue Act of 1916. The question in the case was, whether the income tax law of 1916 required the contributors to a corporation created for charitable uses and purposes, no part of whose net income is for the benefit of any private stockholder or individual, to pay a tax on the income of a residuary estate devised to it, the devise being subject to the payment of certain annuities, all of the annuitants save one being dead. This, too, was but a question of the construction and operation of the revenue law.

Lederer vs. Stockton, 260 U. S. 3, was heard on Certiorari to the Circuit Court of Appeals for the Third Circuit. The case was under the Revenue Act of 1916. The question in the case was, whether the income tax law of 1916 required the contributors to a corporation created for charitable uses and purposes, no part of whose net income is for the benefit of any private stockholder or individual, to pay a tax on the income of a residuary estate devised to it, the devise being subject to the payment of certain annuities, all of the annuitants save one being dead. This, too was but a question of the construction and operation of the revenue law.

Smietanka vs. First Trust & Savings Bank, 257 U. S. 602. This case was heard on Certiorari to the Circuit Court of Appeals of the Seventh Circuit. The case was under the Revenue Law of 1913. The question presented was, whether under the income tax law of 1913 income held and accumulated by a trustee for the benefit of unborn and unascertained persons was taxable. This, likewise, was but a construction and operation of the revenue law.

Lederer vs. Fidelity Trust Company (decided January 26, 1925), 69 L. ed. 234, was heard on Certiorari to the Circuit Court of Appeals for the Third Circuit. The case arose under the Revenue Act of 1918. The question involved was, whether certificates representing the interests of subscribers to a railroad equipment trust, which are to be paid out of rentals for the equipment, are corporate securities, within the meaning of the Revenue Act of 1918 imposing a stamp tax on corporate securities.

McCaughn vs. Ludington (decided April 13, 1925), 69 L. ed. 463, was heard on Certiorari to the Circuit Court of Appeals for the Third Circuit. The case arose under the income tax provisions of the Revenue Act of 1918 and presented a question as to deductible losses sustained from the sale of property acquired before March 1st, 1913.

Irwin vs. Gavit (decided April 27, 1925), 69 L. ed. 546, was heard on Certiorari to the Circuit Court of Appeals for the Second Circuit. The case arose under the income tax act of 1913. The question presented was, whether income paid to the beneficiary under a bequest to trustees to pay the income to a specific person for a series of years, with remainder over, is taxable to the beneficiary as income under the act of 1913 and not exempt as property acquired by bequest.

Your petitioners present herewith as a part of their petition a brief showing more fully their views upon the questions involved.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Eighth Circuit commanding said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of said court of appeals in this case which is entitled in that court "Elizabeth F. Shukert and Isabel C. Shukert, Executrices of the Estate of Gustave E. Shukert, Deceased, Plaintiffs in Error, vs. Arthur B. Allen, Collector of Internal Revenue, District of Nebraska, Defendant in Error," to the end that said cause may be reviewed and determined by this court, as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate.

ELIZABETH F. SHUKERT AND
ISABEL C. SHUKERT,

Executrices of the Estate of Gustave E. Shukert, Deceased, Petitioners.

By .....

Counsel for Petitioners.

STATE OF NEBRASKA }
} ss.
COUNTY OF DOUGLAS }

I, Arthur F. Mullen, being duly sworn, depose and say that I am the counsel named in the foregoing petition; that I have read the petition, know the facts therein contained and that the same are true, to the best of my knowledge and belief.

Arthur F Mullen

Subscribed and sworn to before me this .....day of July, 1925.

.....

Notary Public.

Counsel's Certificate of Merit

I hereby certify that I have examined and read the foregoing Petition for Writ of Certiorari; that in my opinion such petition is well founded and should be granted by this Honorable Court, and that said petition is not filed for delay.

Arthur F Mullen

Attorney for Petitioners.

IN THE

Supreme Court of the United States

October Term, 1925

No. ———

ELIZABETH F. SHUKERT and ISABEL C. SHUKERT, EXECUTRICES OF THE ESTATE OF GUSTAVE E. SHUKERT, DECEASED,

Petitioners,

vs.

ARTHUR B. ALLEN, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF NEBRASKA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

IMPORTANCE OF QUESTION INVOLVED

The amount of property involved in similar trusts; the number of persons interested in these trust estates; the proper administration of the law relating to the taxation of trust estates makes the question involved herein material and important. Until there is a decision by this court on the question presented there will be doubt and uncertainty in the administration of the estate tax laws. The question involved is nation-wide in its application. The right to levy and collect taxes on this class of property and the duty to pay the taxes levied make a decision by this court necessary.

The cases cited in the application for the writ state the familiar rule that tax laws are strictly construed against the taxing power. The taxpayer is given the benefit of any doubt. This rule applies not only to the power to levy the tax, but also to the interpretation and the method of administering the law. It is not necessary to cite cases on the familiar rule that the courts will not extend the application of a tax law to cover either property or persons that are not clearly within its provisions. It follows from this that a writ of certiorari should be allowed in revenue cases where there is any doubt, uncertainty or ambiguity in the revenue law.

The question presented in the case at bar involves the construction of a paragraph in the federal estate tax law. It involves the power of the federal governmtnt to tax an important class of property. Notwithstanding that this question is important and far reaching, *neither the respondents nor the petitioners have found any case either in state or federal courts that decides the precise question presented herein.*

While the issuance of the writ is discretionary, its employment in the case at bar is necessary to maintain harmony and uniformity in the administration of a federal revenue law. The petition exhibits a case in which the powers of the government and the rights of taxpayers can only be fixed through a review and decision by this court.

POINTS AND AUTHORITIES

I.

Writ of Certiorari in revenue case where question involved is of importance and general interest is generally allowed.

Edwards vs. Slocum, 204 U. S. 61.
United States vs. Merriam, 263 U. S. 179.
Weis vs. Stern, 265 U. S. 342.
Lederer vs. Stockton, 260 U. S. 3.
Lederer vs. Fidelity Trust, 69 L. ed. 234.
McCaughn vs. Ludington, 69 L. ed. 463.
Irwin vs. Gavit, 69 L. ed. 546.

II.

If there is any doubt in the construction or operation of a revenue law that doubt must be resolved against the government and in favor of the taxpayer.

Gould vs. Gould, 245 U. S. 151, 153.
United States vs. Merriam, 263 U. S. 179.
Schwab vs. Doyle, 258 U. S. 529.
Baltzell vs. Mitchell, 3 Fed. (2d ed.) 428.
Shelton vs. King, 229 U. S. 90.

III.

Trust created was fully executed. Immediate enjoyment and possession passed to trustee and beneficiaries.

Pomeroy's Equity, Vol. II, 2nd ed., pars. 1001, 996, 997, 998.
Bath Savings vs. Hathorn, 88 Me. 132, 32 L.R.A. 377.
Iness vs. Potter, 130 Minn. 320, 153 N. W. 604.
Note in 3 L.R.A. 902.
Allen vs. Hedrick, 206 Pa. 733, 740.
Lewis vs. Curnutt, 106 N. W. 914.
In re Podhajsky's Estate, 115 N. W. 590.
Haxton vs. McClaren, 132 Ind. 235, 31 N. E. 48.
Board of Trustees vs. Dimmitt, 87 S. W. 536, 113 Mo. App. 41.
Ward vs. Sage, 185 Fed. 7.
Title Guarantee vs. Ward, 164 Fed. 459, 184 Fed. 449.
Revenue Act of June 13, 1898, Chap. 448, U. S. Comp. St. 1901, pp. 2307, 2308.
Coolidge vs. Nichols, 4 Fed. (2nd ed.) 112.

IV.

Estate Conveyed Is Vested, Not Contingent.

In re McClelland's Estate, 70 Atl. 737, 221 Pa. 261.
Rhode Island Hospital vs. Noyes, 26 R. I. 323, 58 Atl. 999.
In re Long's Estate, 228 Pa. 594, 77 Atl. 924.
8 Words and Phrases, 1st ed., 7320.
4 Words and Phrases, 2nd ed., 1157.
Lines vs. Lines, 142 Pa. St. 149, 24 Am. St. Rep. 407.

V.

Transfer was not intended to take effect in possession or enjoyment at or after death, within the meaning of the terms used in Act of 1918.

Y. M.C. A. vs. Davis, 264 U. S. 47, 68 L. ed. 337.
Edwards vs. Slocum, 264 U. S. 61, 68 L. ed. 313, 314.
Knowlton vs. Moore, 178 U. S. 41, 49; 44 L. ed. 969, 973.
Curley vs. Tait, 276 Fed. 840, 843.
Vanderbilt vs. Eidman, 146 U. S. 480, 49 L. ed. 963.
Gleason & Otis Inheritance Taxation (3d ed.) 27.
Gaither vs. Miles, 268 Fed. 692.
Safe Deposit & Trust vs. Tait, 295 Fed. 429.
State, etc., Co. vs. Treasurer, etc., 209 Mass. 373, 95 N. E. 851.
Cole vs. Nickle, 43 Nev. 12, 185 Pac. 565.
Reish vs. Commonwealth, 105 Pa. St. 521, 526.
Re Dolan's Estate (Pa.), 124 Atl. 176.

VI.

Trial court erred in overruling plaintiff's motion for an instructed verdict. The trial court erred in not submitting issues of the case to the jury. The Circuit Court of Appeals erred in affirming the judgment of the trial court.

Sub-par. (c), Sec. 401, Revenue Act of 1918 (R. pp. 19, 20).
Opinion of Trial Court (R. pp. 180, 183, inc.).
Shukert vs. Allen, 300 Fed. 754.

SCOPE OF 1918 ACT

Sections 402 and 403 of the Revenue Act of 1918, Fed. Stats. Supp. 1919, pp. 131-132, outline a method of ascertaining the value of the gross estate and the value of the net estate of the taxpayer for the purpose of fixing the amount that is to be used as the basis for collecting estate taxes. Insofar as it relates to the matters here involved, Section 402 provides:

> "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *
>
> * * * * *
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death. * * *"

Following this, there is a provision that any transfer made without consideration within two years prior to the death of the decedent is deemed to be made in contemplation of death.

Under the provisions of subdivision (c), Sec. 402, provision is made to tax two different kinds of trusts:

(a) Trusts that are created in contemplation of death;

(b) Trusts that take effect in possession or enjoyment at or after the death of the founder. These are the only kinds of trust estates that can be taxed. Any trust that is not made in contemplation of death or that takes effect before the death of the founder is not within the scope of this section and, therefore, not subject to taxation.

This section clearly recognizes the right and power of a taxpayer to create a trust. Its purpose is to tax trusts

that are made in contemplation of death, trusts that do not take effect until after the death of the founder.

The Circuit Court of Appeals has extended the scope of this section to cover other trusts in which the beneficiaries do not come into the actual possession of the property before the death of the founder. An application of the doctrine announced by the Circuit Court of Appeals would levy an estate tax on every executed trust which by its terms fixes the termination of the trust at a date subsequent to the death of the founder.

CONSTRUCTION OF STATUTE

The decision turns on the construction and effect of the words "intended to take effect in possession or enjoyment at or after his death," as applied to the instrument executed by the founder on May 5, 1921, a copy of which appears in the Record, pages 11-14. The petitioners claim that under the terms of this instrument the possession and enjoyment of the property involved passed from the founder to the trustee, and the beneficiaries at the time this instrument was executed. The act of the founder and the terms of the trust agreement gave the trustee the legal title and the possession of the property involved; it gave the equitable title to the beneficiaries. Both of these titles passed *in presenti*. The transaction was completed on the 5th of May, 1921. The possession and enjoyment of the property involved in no way depended upon the death of the founder. The interests of the trustee and of the beneficiaries were fixed by the terms of the instrument. The death of the founder in no way changed or affected either the possession of the trustee or the interests of the beneficiaries. When the founder died in September, 1921, there was no change either in the rights, powers or interests of the trustee or the beneficiaries. As the possession of the property changed from the founder to the trustee on the date the instrument was executed, it is clear that no

claim can be made that the possession was to take effect at or after the death of the founder.

The question resolves itself into a consideration of whether or not the founder intended the enjoyment of the property to take effect at or after his death. This intention must be gathered from a consideration of the law relating to trusts, as applied to the conduct of the founder. By his act the founder made an executed trust.

LAW OF EXECUTED TRUSTS

The question presented involves a correct understanding and application of the law relating to trusts. The document executed by Shukert and accepted by the Trust Company is the ordinary form (see R. p. 28) used in making an executed trust. It conveys absolutely and unconditionally all interest that the founder had in the property described therein to the trustee for the benefit of his three children. No reservations were made by the founder. As soon as he executed this instrument and delivered the property described therein to the trustee, the possession and enjoyment of all of the property involved passed from the founder forever. Under the terms of this instrument, there is no doubt nor room for dispute regarding the purpose of the founder or the effect of his act. He parted with the ownership, possession and title to the property involved.

Pomeroy's Equity, Vol. II, 2nd ed., par. 1001, defines an executed trust, as follows:

> "A trust is executed when no act is necessary to be done to give effect to it, when the trust is fully and finally declared in the instrument creating it. A conveyance of land to A in trust for B, a devise of land to A in trust to receive the rents and profits and apply them to the use of B, are examples. It is plain that all ordinary express, passive or active trusts are thus executed."

This same author in discussing voluntary trusts says in paragraph 996:

"When will trusts, and transactions in the nature of trusts, which are purely voluntary, virtual gifts be treated as binding and enforcible in equity? The answer, it will seem, turns upon the distinction between trusts which are executed—that is, completely created or declared—and those which are merely executory, incomplete—that is, promises to create a trust."

Again in paragraph 997 this same author says:

"In order to render the voluntary trust valid and effectual, the party creating it, either by direct transfer or by declaration, must have done everything which, according to the nature of the property comprised in it, was necessary to be done in order to transfer the property and render the transaction binding upon him. A person holding property, real or personal, and intending to make a voluntary disposition thereof for the benefit of another, may do so in either one of three modes:

"1. He may make a simple conveyance or assignment of it directly to the donee, so as to vest in the latter whatever interest and title the donor has, without the intervention of any trust;

"2. He may make a transfer to a third person upon trust declared in favor of the donee;

"3. He may retain the title and declare himself a trustee for the donee and thus clothe the donee with the beneficial estate. * * *

"If the donee adopts the second or third mode * * * he must employ language which shows unequivocally an intention on his part to create a trust in the third person or to declare a trust in himself. * * * These conclusions are sustained by the decided weight of authority and must be regarded as the settled rules of equity jurisprudence upon the subject."

And, continuing in paragraph 998, this author says:

"If the donor makes a complete conveyance of real property or assignment of personal property sufficient to vest the legal title in the donee; or if he completely conveys or assigns the property to the trustee upon trust effectually created on behalf of the donee; or if he retains the legal title but effectually declares himself a trustee for the donee, thus clothing the donee with all of the beneficial estate—then, in each of these instances, the gift is valid although voluntary; the donee's rights are perfect and equity will enforce them against the donor and all persons claiming under him as volunteers."

In *Bath Savings vs. Hathorn,* 88 Me. 132, 32 L.R.A. 377, the Court said:

"A voluntary trust is an equitable gift, and, like a legal gift *inter vivos,* must be complete. A declaration of trust as effectually passes the equitable title of the fund to the *cestui* as a gift *inter vivos* passes the legal title to the donee. The distinction between them is of a technical nature. In a trust the real title vests in the donee, but the legal title, perhaps, carrying control of the property, may be placed elsewhere; while in a gift both the real and legal title instantly fall to the donee. It is not necessary, therefore, that he who declares a trust should divest himself of the legal title, if, perchance, he so does it as to transfer the real or equitable title to the *cestui;* for then he creates an estate really no longer his own. He may retain the legal title, giving him the control, but for the benefit of the *cestui,* according to the terms of the trust. His control becomes subject to the direction of courts of equity, that always supervise the administration of trusts. They are the children of equity. They spring from it, and cannot survive without its aid and control. The trustee is merely an agent to administer them, and nothing more."

Iness vs. Potter, 130 Minn. 320, 153 N. W. 604. See note in 3 L.R.A. 902.
Allen vs. Hedrick, 206 Pa. 733, 740.

In *Lewis vs. Curnutt*, 106 N. W. 914, the Court said on page 918:

> "It needs no argument to support the proposition that the owner of land may sever the fee into a life estate and a remainder, and that he may reserve the former to himself and sell or give the latter to whomsoever he will. When he has done so, can it be said that the grantee of the remainder acquires no present interest in the land simply because he cannot come into possession and enjoyment of the property until after the grantor's death? We think no lawyer will answer this inquiry in the affirmative. And yet such would be the necessary result if the contention of the appellee here be correct. Mrs. Crockett conveyed the property by an unconditional deed, and by an accompanying instrument provided that the trustee should not come into possession or control until after her death. The legal effect of this was to create a life estate in her and a remainder in the trustee for the benefit of a *cestuis que* trust. Moreover, it must be remembered that it is not necessary in any case to the establishment of a trust that any beneficial interest shall pass to the trustee. From its very nature a trust involves the idea of a separation of the beneficial interest from the legal title. When a trust is executed by the delivery of a simple conveyance to the trustee, that act and instrument serve to pass an immediate present interest to the *cestui que* trust, no matter how far in the future the enjoyment of the benefit thus provided may be deferred."

In *Podhajsky's Estate*, 115 N. W. 590, the Supreme Court of Iowa said on page 592:

> "It will not be disputed that it is entirely competent for a person, either by a duly acknowledged written instrument or even by parol, to turn over personal property, moneys, securities, or choses in action into the hands of another, to be held and used for the benefit of some designated beneficiary, and that, when this is done, such beneficiary obtains an immediate and vested interest in the subject of the trust, which the

trustor cannot revoke or disaffirm unless such power of revocation has been reserved in express terms at the time the trust was created. Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659; Nichols v. Emry, 109 Cal. 323, 41 Pac. 1089, 50 Am. St. Rep. 43; Ewing v. Buckner, 76 Iowa 467, 41 N. W. 164; Millspaugh v. Putman, 16 Abb. Prac. (N. Y.) 380."

In further discussing this question the Court said on page 593:

"In Haxton v. McClaren, 132 Ind. 235, 31 N. E. 48, a father delivered notes to his son in trust to be collected, and the proceeds to be paid in part to certain children and grandchildren, with the provision that whatever balance of the money so collected should remain in the hands of the son after the death of the donor should be equally divided between two named persons. Upon this state of facts the Supreme Court of Indiana held that the transaction was such a trust and completed gift that the notes were no longer a part of the father's estate, and were not affected by the will thereafter executed by him making a different disposition thereof. Many other authorities to the same general effect could be cited. We regard it as a settled question that, except as regulated or restricted by statute, a person having property or property rights of any kind, whether legal or equitable, may give the same in his lifetime either directly to the donee or by any suitable declaration to a third person for the use of the donee, authorizing such person to make delivery of the subject of the gift after the donor's death."

When the founder parted with the possession and enjoyment of the property involved, this possession and enjoyment passed to some one else. Neither the possession nor the einjoyment of the property was in the founder at the date of his death. As this property was not a part of his estate, it cannot be included for the purpose of ascertaining the value of the founder's estate. When the founder created this trust estate the title to the property passed to and vested in the beneficiaries and the trustee.

Under the terms of the instrument executed by the founder, there was no suspension of the equitable title. If the equitable title was suspended in whom did it vest? It was not in the founder. It had passed from the founder. The trust instrument designates the three children of the founder as the beneficiaries. It is entirely plain that no one else has any beneficial interest in the estate. Other provisions in the instrument provide who shall inherit the property in the event the beneficiaries die. That did not prevent the equitable title from vesting in these beneficiaries on the date the trust was created.

Under the doctrine announced in *Shelton vs. King,* 229 U. S. 90, the founder had the power to create a trust estate and place limitations on the use of the property given to the beneficiaries. The fact that the founder in this instrument made provision for the distribution of the property in the event any of the beneficiaries should die before the end of the trust period, did not prevent the vesting of the equitable interest in the beneficiaries at the time the trust instrument was made.

The founder could not make an unconditional conveyance of his property and at the same time suspend the passing of the legal and equitable title to the persons to whom he made the conveyance. He could, subject to the law against perpetuities, suspend the alienation of the property. In creating the trust he did not attempt to suspend either the passage of the legal or equitable title, nor did he place any unlawful restraint on the right to alienate the property. His act vested the title to the property in the persons to whom it was conveyed.

TRUST INSTRUMENT PASSED IMMEDIATE ENJOYMENT TO BENEFICIARIES

One of the definitions of "enjoy" given by Webster is "to have the benefit of." As soon as this trust was created, the only persons who had any interest in it were the

trustee and the beneficiaries. The trustee had possession, the beneficiaries had the benefits. True, the complete possession of the property did not pass to the beneficiaries until thirty years after the instrument was executed. The delayed possession did not deprive the beneficiaries of the enjoyment of the property. All earnings of the trust funds were to be held for the benefit and use of the beneficiaries.

The beneficiaries began to enjoy the benefits of the trust as soon as it was created. They will continue to enjoy these benefits. They became and are now the owners of the principal and all accumulations. The trustee is in possession of the property but holds it in trust for the benefit and use of the beneficiaries.

> "The word 'enjoy' means to have, possess, and use with satisfaction; to occupy *or have the benefit of.*" Board of Trustees v. Dimmitt, 87 S. W. 536, 113 Mo. App. 41.

The Revenue Act of June 13, 1898, Chap. 448, U. S. Comp. St. 1901, pp. 2307, 2308, imposed legacy taxes on property "transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor."

This provision was construed in *Ward vs. Sage,* 185 Fed. 7; *Title Guarantee vs. Ward,* 164 Fed. 459, 184 Fed. 449.

ESTATE CONVEYED IS VESTED, NOT CONTINGENT

The Circuit Court of Appeals attempts to treat the estate conveyed to the beneficiaries as a contingent estate. There is nothing in the trust instrument that warrants this construction. The estate of the beneficiaries is a vested estate. *It gave an immediate right to the present enjoyment of the estate.*

In re McClelland's Estate, 70 Atl. 737, 221 Pac. 261, the Court said:

> "To vest an estate is to give a legal or equitable *seisin.* An estate 'vests' in a person who is given a

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present and immediate interest, as distinguished from an interest the existence of which depends on a contingency. The word applies to estates in personalty, as well as estates in land."

In *Rhode Island Hospital vs. Noyes*, 26 R. I. 323, 58 Atl. 999, the Court said on page 1002:

"In determining whether an estate is 'vested' or contingent, 'the question is always: Is futurity annexed to the substance of the gift? If so, the vesting is postponed. Or is it annexed to the time of payment only? If so, the legacy vests immediately.' Another authority says: 'The question of "vested" or contingent is not to be tested by the certainty or uncertainty of obtaining the actual enjoyment, for that would make the character of the estate depend, not upon the terms of its creation, but on the form of the result. Neither does it depend on the defeasibility or the indefeasibility of the right of possession, for many estates are vested without possession, as well as with, which are yet defeasible. If there is a present right to a future possession, though that right may be defeated by some future event, contingent or certain, there is nevertheless a vested estate.'"

In re Long's Estate, 228 Pa. 594, 77 Atl. 924, the Court said on page 928:

"If there is a present right to a future possession, though that right may be defeated by some future event, contingent or certain, there is nevertheless a vested estate; an unpossessed estate being vested if it is certain to take effect in possession by enduring longer than the precedent estate. A will gave the residue of tetstator's estate to a trustee for 20 years, with power to invest and reinvest it, and provided that, when there should be a greater accumulation than the trustee deemed necessary for the purposes of the trust, he should divide it into six equal shares, paying one share to each of testator's five children and dividing one share among the children of testator's deceased son, and provided that, if any of testator's children

should die without leaving lineal descendants before expiration of 20 years after testator's death, their shares should go to the other legatees, share and share alike, per stirpes and not per capita, and that at the expiration of 20 years the trustee should sell the property and divide it into six shares to be distributed as provided for distribution of the income. *Held,* that all legacies under the will were vested subject as to the children to be divested by death within 20 years without leaving lineal descendants. The legacies to the children of testator's deceased son were vested absolutely and unconditionally, so that an administrator of a deceased daughter of testator's deceased son was entitled to share in a distribution of income."

8 Words & Phrases, 1st ed., 7302.
4 Words & Phrases, 2nd ed., 1157.

In *Lines vs. Lines,* 142 Pa. St. 149, 24 Am. St. Rep. 407, claim was made by the wife that certain property conveyed in trust by her deceased husband was a part of his estate at the time of his death. The husband had executed a deed of trust to the Union Trust Company and made it a trustee for certain beneficiaries named in the deed. In discussing this question, the Court said:

"When we come to examine the deed to William E. Lines, we find an absolute conveyance to him of certain securities specified therein upon the following trusts:

"'To have and to hold all of said shares of stock unto the said William E. Lines, his executors, administrators, and assigns, upon the following trusts, to-wit, in trust, to divide the same into twenty-eight equal shares, of which he shall hold fourteen shares for the use of my putative son, the said William E. Lines, and of the remaining fourteen shares he shall hold ten, to-wit, one each for the use of the ten children of my deceased sister, Mary Fairchild, named respectively * * * and the remaining four shares he shall hold for the use of my brother, John Lines. During my life the said William E. Lines shall pay over to me and for my use, at the times he may receive the same, all the dividends or other income which he may receive upon and from

all of the above described stocks, and he may deliver the shares thereof above mentioned unto the several beneficiaries above named, at such time or times as he, in his unfettered discretion, shall think fit. And should he, in the exercise of his discretion, determine to hold the same during my life and thereafter, he may, after my death, pay the income thereof to the said beneficiaries respectively, and in their several proportions, until such times as he may see fit to transfer the principal of the said shares to the persons entitled thereto respectively,' etc.

"It is idle to call this a testamentary paper. It passed his entire legal title to the trustee, with a *present interest.* He parted with the property wholly and entirely. Even the reservation of the income to himself for life was optional with the trustee. The latter could have distributed the corpus of the estate to the beneficiaries the next day. The power of revocation reserved in the deed, having never been exercised, was precisely as if it had never existed. A reserved right of revocation is not inconsistent with the creation of a valid trust. If the right is not exercised during the lifetime of the donor, and according to the terms in which it is reserved, the validity of the trust remains unaffected, as though there had never been a reserved right of revocation; Dickerson's Appeal, 115 Pa. St. 198, 2 Am. St. Rep. 547; Stone v. Hackett, 12 Gray 227. *There is nothing in this deed to indicate an intention to create a trust to take effect only after the death of the donor. On the contrary, the intent is clear to create a present trust in favor of the beneficiaries named therein, to take effect immediately with the execution of the deed.* The securities passed into the hands of the trustee along with the trust deed. The transaction was complete, and the donor was absolutely denuded of his property. It is useless to pursue the subject further. The appellant had no case, and her bill was properly dismissed."

In the late case of *Coolidge vs. Nichols,* 4 Fed. (2nd) 112, the District Court of Massachusetts construed the provisions of Section 402 of the Revenue Act of 1918 and con-

strued the provision "intended to take effect in possession or enjoyment at or after the death." The court held that where a mother two years before her death conveyed real estate by warranty deed to her two sons, who at the same time executed leases for one year for a nominal rental with a right to renew leases from year to year, subject to the right of either party to terminate them at the end of a year, by written notice, the effect was to vest complete title and right of possession in the grantees, not dependent in any way upon the death of the grantor, and that the grantees had no interest therein subject to tax under Section 402, Revenue Act of 1918.

The Court also considered and construed a trust agreement made by the mother and her husband, whereby property was conveyed to her sons, the income from which was to be paid to the donors during their life. Later by a separate instrument, the donors assigned all their interest to the sons with directions to the trustees to pay the income to said sons. The Court held that as to the principal of the fund, the arrangement was intended to take effect in possession or enjoyment at or after the death of the donors and that the said property should be included for taxation under the provisions of Section 402 of the Act of 1918.

This case discussed at length some of the questions involved in the case at bar. An application of the doctrine announced by the Court to the facts in the case at bar would warrant a reversal.

MEANING OF THE ACT

The tax in controversy is an "estate tax" imposed under the alleged authority of the Revenue Act of 1918. With reference to an estate tax, the Act declares in Section 401:

> "A tax * * * is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act."

The language is plain. The word "transfer" means to pass, transmit. The word "estate" in its broadest sense, means property. The plain meaning of the language used is to place a tax upon the right or privilege to transfer, pass or transmit property, by reason of the death of the owner. Necessarily, there must be an estate—property—to be transferred or passed by reason of the death of the decedent, or there can be no tax. It follows that the property taxed must in some way be a part of the estate at the date of the death of the decedent.

The aim of the act is to collect taxes on the interest which ceased by reason of the death of the taxpayer. This Court has uniformly construed the act in conformity with its declared purpose. Many cases could be cited, the following are sufficient:

Y. M. C. A. vs. Davis, 264, U. S. 47, 68 L. ed. 337.
Edwaras vs. Slocum, 264 U. S. 61, 68 L. ed. 313, 314.

It necessarily follows from such definition, first, that that the Act imposes a tax only on the transfer of such property interest as ceased at and on the death of the decedent, and, second, that property transferred by the decedent in his lifetime and in and to which he reserved neither legal nor equitable title or interest, is not a part of his taxable estate, for that, no interest in such property ceased at and by reason of his death.

As this Court has defined estate tax imposed by the Act of 1918 as tax not upon "the interest to which legatees and devisees succeed on death," but a "tax "upon the interest which ceased" by reason of the decedent's death, such definition is a guide to the meaning of the other provisions of the Act and controls and limits such meaning.

This definition is basic and fundamental. The thing taxed is the interest in property which ceased by reason of decedent's death and on account of such death is trans-

ferred by law or testament to another. Hence, in construing the various provisions of the Act, each provision, phrase and word refers back to this basic and fundamental definition and must be construed with reference thereto. It can not be assumed that any provision of the Act authorizes the imposition of a tax other than a tax "upon the interest which ceases by reason of decedent's death."

The estate tax imposed by the Act of 1918 is not a tax on legacies or inheritances. It is not a tax on the right or privilege of receiving or inheriting property. It is a tax on the estate, in the nature of a death duty; it is a tax on the right or privilege to transfer or transmit property from the dead to the living.

The distinction is a practical one. In *Knowlton vs. Moore,* 178 U. S. 41, 49; 44 L. ed. 969, 973, the Court quoted the following from *Hanson, Death Duties,* page 63:

> "What it (referring to the British Statute) taxes is not the interest to which some person succeeds on a death, but the interest which ceases by reason of the death. Unless this principle is kept clearly in view, the mind is constantly tempted by the wording of the Act to revert to principles of succession duty which have no real connection with the subject."

In *Curley vs. Tait,* 276 Fed. 840, 843, the Court spoke of this distinction as follows:

> "The distinction is not pedantic, not technical, but * * * is in the highest degree practical."

True, in either case there must be an estate—property—to be transferred from the dead hand to the living hand. In the case of a succession tax, it is not imposed until the property is, in fact, received. The right to receive may be subject to contingencies that may or may not happen. In such case the contingent right to receive is not taxable because the heir or devisee has not received the

property. *Vanderbilt vs. Eidman,* 146 U. S. 480, 49 L. ed. 963.

In the case of an estate tax—that is, a tax on the right to transfer or transmit property from the dead to the living—the tax is imposed when and as the transfer takes place, which transfer always occurs at the time of the death of the decedent. That is to say, on the death of the decedent his property passed *eo instanti* under the law or by tetstament to others. It is such transfer that is taxed by the Revenue Act of 1918.

Further, it must be kept in mind that death of the donor is the generating source from which the tax power takes its being. *Knowlton vs. Moore,* 178 U. S. 41, 44 L. ed. 969, was an action which arose under the Revenue Act of 1898, which imposed a tax on legacies and inheritances; in other words, a tax on the right to receive property. In that case the Court reviewed and restated the law if inheritance taxes or death duties. On page 55, after reviewing the law from ancient to modern times and stating that although such taxes or duties were assessed in different ways and under different names, it announced the following rule:

> "* * * nevertheless, tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular tax power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which said taxes are more immediately rested."

And further, on page 78, the Court, in speaking of said taxes, said:

> "* * * Of course, they concern the passing of property by death, for if there was no property to transmit, there would be nothing upon which the tax levied upon the occasion of death would be computed."

In *Gleason and Otis, Inheritance Taxation* (3d ed.) 27, the rule is stated as follows:

> "It is not a transfer between the living that is taxed, but a transfer from the dead hand to the living hand; and, therefore, it is the doctrine * * * that the transfer which is the subject of the tax, takes place at death."

The Revenue Act of 1918 does not tax gifts, unless made in contemplation of death. Here it may be said that a gift made in contemplation of death is necessarily testamentary in character and the property so transferred is taxable as passing at the death of the decedent. The law looking through form to substance taxes the property so transferred. But that is not this case.

Gaither vs. Miles, 268 Fed. 692, was a suit to recover estate taxes. The taxes were imposed by the Commissioner on the proceeds of five policies of insurance upon the life of the testator, who about two months before his death had caused them to be made payable to his son and daughter. As to one of the policies he reserved to himself the right to again change the beneficiary; and as to another policy of the endowment class, which had about 19 months longer to run, he provided that if he were living at its maturity the amount becoming due under it should be paid to him. The Court held the proceeds of said two policies taxable, saying:

> "In neither of the above instances was the transfer intended to take effect in possession or enjoyment until the death of the assignor."

The Court held the proceeds of the remaining three policies not taxable. The proceeds of the two were taxable for the reason only that the assignor reserved unto himself certain rights therein.

Curley vs. Tait, 276 Fed. 840, was an action to recover estate taxes. Among the items of the tax was one imposed

on property covered by an ante-nuptial agreement wherein the deceased just prior to his marriage transferred certain property to Johns Hopkins Hospital under an agreement, on the part of the hospital, to pay, after the marriage was solemnized, the net income of the property to the wife, during her life and afterwards to the testator during his life, if he should prove to be the survivor. The defendant imposed the estate tax on the property so transferred because "it says that the hospital was not to enjoy the stock until after his death," but the Court held the property not taxable, saying:

> "Was the defendant justified in requiring the payment of the tax upon the full value of the stock transferred in contemplation of Grafflin's marriage, to the hospital, which covenanted to pay the net income thereof to the prospective wife during her life; Grafflin reserved nothing of substance to himself except the right to the net dividends during so much of his life as should extend beyond hers, thus making his interest dependent altogether upon the contingency that he should prove to be the survivor? If all beneficial ownership irrevocably passes from the transferer at the time of the transfer, it would seem to be immaterial whether it goes to one person or to several, and if to several, whether their enjoyment is to be simultaneous or successive, and, if the latter, at what time or upon the happening of what event the rights of one give place to those of another. * * * It follows that all that is taxable, if anything, is in the language of the statutet, 'the interest which he retained for himself.'"

In *Safe Deposit & Trust Co. vs. Tait*, 295 Fed. 429, a husband and wife in their lifetime conveyed property to a common trustee, on condition that each was to receive the income from the property conveyed by him or her during their life and the remainder was to descend to the surviving spouse. The court held that this trust was subject to tax under Section 402 because it created a trust in contemplation of death.

In *State, etc., Co. vs. Treasurer, etc.*, 209 Mass. 373,

95 N. E. 851, the Court, construing a similar provision in the Massachusetts statute, said:

> "The test, however, by which the exemption is to be ascertained, does not depend upon whether the power to revoke has or has not been inserted, but upon the passing of the property with all the attributes of ownership independently of the death of the transferrer."

Note the language of the Court is "passing of the title," not receipt by the beneficiaries of title, possession or enjoyment.

In *Cole vs. Nickle,* 43 Nev. 12, 185 Pac. 565, the Court, in construing a similar provision of the statute of Nevada, said:

> "The test in determining whether, under a deed, grant or gift, the property was not intended to vest in possession or enjoyment until after the death of the grantor, does not depend upon whether a power to revoke has or has not been inserted, but on whether or not the property passes with all the attributes of ownership, independently of the death of the transferrer."

Reish vs. Commonwealth, 106 Pa. St. 521, 526, was an action wherein the Court construed a similar provision of the statute of Pennsylvania. The facts were: Reish had made an absolute deed of land and took back from his grantee a bond to pay him the income of the land during his life. The Court held the transfer of property so conveyed taxable, saying:

> "It is true, the obligation of the bond was not inserted as a condition or reservation in the deed; it was in form a mere personal obligation; but this contention does not involve a technical question of title, nor a lien; the whole matter depends upon the single fact whether or not the transfer was made or intended to take effect in enjoyment at the death of the grantor. The policy of the law will not permit the owner of an estate to

defeat the plain provisions of the Collateral Inheritance Law by any device which secures for him, for life, the income, profits, and enjoyment thereof; it must be by such a conveyance as parts with the possession, the title, and the enjoyment in the grantor's lifetime."

In *Re Dolan's Estate* (Pa.), 124 Atl. 176, a decedent transferred certain property in trust for the period of twenty-one years from and immediately after the death of her last surviving lineal descendent living at the time of her death. The income was to be paid to her three children during their lives and at the termination of the trust, the corpus of the trust property was to be divided among the issue of her three children. The trustee was given full power to grant, sell and convey the trust estate for such price and upon such terms as it deemed best, and the grantor reserved to herself the power to change the trustee and also the power to revoke the trust.

The Court held the transfer not taxable and, after quoting the provision of the statute imposing the tax upon transfers of property, as follows: "When a transfer * * * by deed, grant, bargain, sale or gift * * * intended to take effect in possession or enjoyment at or after death," said:

"To escape the latter provision, a conveyance must be such as parts with possession, title and enjoyment in the grantor's lifetime.

INTENTION OF FOUNDER

At the time this trust was created, the founder possessed an estate worth more than one million dollars. The creation of this trust was not intended by him to be a testamentary disposition of any part of his estate. He was 56 years of age and in his normal state of health. He died on September 29th, 1921—four months and twenty-four days after the trust was created. Two days before his death he made a will (Exhibit 2, R. p. 68) by which he disposed of all the estate that he then owned. The value of

this estate as shown by the return of the executrices was $801,095.68, and the departmentt ascertained that the net taxable estate for $673,691.89, and under the provisions of the Act of 1918 levied taxes against it of $26,921.50. The validity of this tax is not questioned.

The founder intended to make a present of this trust property to his children. He had the lawful right to do this. A gift was not taxable under the laws that existed at the time. The Revenue Act of 1924, Title III, par. 2, imposes a tax upon gifts. This is a legislative recognition that the Act of 1918 did not tax them.

JUDGMENT IS ERRONEOUS

The trial court erred in sustaining defendants' motion for an instructed verdict. The Court of Appeals erred in sustaining the judgment of the trial court. At the conclusion of the testimony, the petitioners moved the trial court (R. 175) to instruct the jury to return a verdict in favor of the plaintiffs (petitioners) and against the defendants. Such motion would lie if, under the evidence, the transfer in question was "not made in contemplation of death" nor "not intended to take effect in possession or enjoyment at or after death." To sustain this motion it was necessary for the trial court to find both of these facts in favor of the petitioners. The trial court overruled petitioners' motion; sustained the motion of the defendant for an instructed verdict on the ground that the trust created was intended to take effect at or after the death of the founder.

The founder having died within two years after the trust was created, there is a presumption that it was made in contemplation of death. This was a question of fact that should have been submitted to the jury. The trial court held (R. 174) that it was not necessary to pass on this question for the reason that on its construction of the law, the trust was not intended to take effect in possession or enjoyment until after the death of the donor,. If the trial

court was in error in this, the motion of the petitioners should either have been sustained and the jury instructed to return a verdict in their favor, or the issue as to whether or not the trust was created in contemplation of deatah should have been submitted to the jury. In this the trial court erred. The Circuit Court of Appeals in affirming the judgment of the trial court erred.

Upon the foregoing considerations and those assigned in the petition, a Writ of Certiorari should be granted herein.

Respectfully submitted,

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Counsel for Petitioners.

Dated this 23rd day of July, 1925.